In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1324

LENA ROSA K. CONLEY, PETITIONER

v.

DR. RAYMOND L. ECK, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, a former federal employee, seeks review of the court of appeals' decisions affirming the dismissal of a series of actions she had brought against the following persons:

(1) Dr. Raymond L. Eck, Chief of the Medical Division, Bureau of Retirement, Insurance, and Occupational Health, United States Civil Service Commission;

(2) Clarice F. Hens, Legal Counsel in the Navy's Office of Civilian Manpower Management;

(3) Senator Sam Ervin, former Chairman of the Committee on the Judiciary, Subcommittee on Constitutional Rights; and

(4) Representative Thaddeus Dulski, Chairman of the Committee on the Post Office.

All of the suits apparently arose out of an effort by petitioner to have a "satisfactory" performance rating raised to an "outstanding" rating, to show that her resignation was forced rather than voluntary, and to have reference to a former psychiatric disability expunged from her record (Pet. App. A-4 to A-7).

Petitioner's suit against Dr. Eck was for libel based on his reply to an inquiry by her attorney concerning her medical record. Petitioner considered libelous the doctor's reply that "[a] history of mental illness does not disqualify a person from all Federal positions. Medically speaking, Mrs. Conley should not have any difficulty obtaining a Federal position" (Pet. App. A-8).

Petitioner's suit against Ms. Hens stems from a letter written by Ms. Hens, as counsel for the Navy, to the Chairman of the Civil Service Commission's Appeals Review Board, in response to a request for the Navy's views on petitioner's claim that she had been forced to resign (Pet. App. A-8). Petitioner objected to two references in the letter to her former psychiatric disability (*ibid.*).

Petitioner's suit against Senator Ervin and Representative Dulski alleges that she suffered wrong due to Congress' failure to amend 5 U.S.C. 8347(c), which provides that a decision determining disability is not subject to further review (Pet. App. A-14, A-15).

The district court granted defendants' motions for summary judgment in the first two actions, relying on *Barr* v. *Matteo,* 360 U.S. 564, and granted defendants' motion to dismiss in the third suit relying, *inter alia,* on *Tenny* v. *Brandhove,* 341 U.S. 367 (Pet. App. A-14 to A-16). The court of appeals affirmed, on the ground that the defendants were all public officials who had acted within their respective lines of authority and who

were therefore immune from suit under *Barr* v. *Matteo, supra* (Pet. App. A-20).

The decision below is correct. Read in the light of *Wood* v. *Strickland,* 420 U.S. 308, and *Scheuer* v. *Rhodes,* 416 U.S. 232, at a minimum *Barr* still stands for the proposition that public officials are immune from libel actions premised upon statements made by them in good faith and without malice in the course of their official duties. There was no genuine issue here concerning the good faith or nonmaliciousness of the respondents Eck and Hens who, within the course of their official duties, did no more than to refer to petitioner's medical record. The district court thus properly granted the motions for summary judgments.

Petitioner's complaint against Senator Ervin and Representative Dulski plainly failed to state a cause of action. A legislator's refusal to seek amendment of a statute is not actionable. The district court thus properly dismissed petitioners complaint against the members of Congress.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1976.

DOJ-1976-05